IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2052 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
OKHABHAI MASHRUBHAI RABARI

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Appearance :
MR I.M. PANDYA APP for Appellant

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 25/04/2007

ORAL JUDGMENT :(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Criminal Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Sessions Judge, Second Fast Track Court, Banaskantha at Deesa, on 16th of June, 2005, in Special Case No. 41 of 1997, whereby the present respondent being accused of said Special Case, was charged with the offences punishable under Sections 435, 504, 506(2) of the Indian Penal Code as well as for the offence punishable under Section 3(1)(10) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The accused respondent came to be acquitted by the above referred judgment and order and, hence, this Appeal by the State.

2 As per the prosecution case, deceased complainant Amrabhai Okhabhai Harijan presented a private complaint on 30th of September, 1996, in the Court of Special Judge at Banaskantha, which was recorded as Criminal Enquiry No. 14 of 1996, in which it was stated by the complainant that Amrabhai Okhabhai Harijan, complainant, was residing at village Asasan, Taluka - Tharad and was doing agriculture business. Accused Okhabhai Mashrubhai Rabari was residing in village Lakhni, which was located near the village of complainant. The complainant had crop of `bajara' in his field and after cropping, the crop was prepared and was stacked in the field.

Cousin brother of the complainant had a partnership in agricultural operations of the accused and since the accused did not clear the accounts of the agricultural business, cousin brother of the complainant was demanding the accounts from the accused, but accused threatened cousin brother of the complainant that if he had demanded the accounts or the money, he would be done to death. On 29th of September, 1996, the complainant had stacked his crop of `bajara' in his field and was staying in residential house situated in the filed. On that day, at about 3'O clock in the night, he noticed fire in the field and, therefore, with a torch in his hand, he went to the field immediately and witnessed that the accused had put a fire in the crop of bajara, which was stacked in the filed. The accused had in his hand a lighting stick with fire. While complainant reached near the accused, he started giving abuses and threats to the complainant, saying that the complainant belonged to lower community and that the complainant would also be burnt by him like the crop of bajara. Therefore, the complainant started shouting and Pirabhai Sagarambhai Thakore and Jesungji Karsanji Thakore came running to the field of complainant having heard shouts of the complainant. On seeing these two persons, accused ran away from his field. According to the complainant, the accused damaged his crop to the extent of Rs. 12,000/- and, hence, the above said complaint came to be filed before

the Special Judge by the complainant. The learned Special Judge, vide order passed, forwarded the complaint to the police, under Section 156(3) of the Code of Criminal Procedure and Tharad Police Station PSO Ganeshbhai Panchabhai, registered the said complaint as `M' Case No. 46 of 1996. The investigation of the crime was entrusted to ASI, Ambuji Masutji of Tharad Police Station, and after investigation, a charge sheet came to be filed by the police before the Special Judge for the above said offences.

3 The learned Additional Sessions Judge framed charges against the accused vide Exhibit-9 on 6th of April, 2005. The accused pleaded not guilty and, hence, the prosecution examined in all seven witnesses as under to prove its case.

PW-1, Exhibit -12, Dharsiji Hamirji is examined to be a panch of panchnama Exhibit – 27 drawn by the Investigating Officer in respect of scene of offence, in which the crop of bajara was seen burnt. Detailed panchnama was drawn. The panch stated that he had been to the scene of offence and had subscribed his thumb impression on panchnama at Exhibit-27 and had seen burnt crops of bajara. In his examination-in-cross, he stated that, earlier there were criminal litigation between the parties. Further he stated that he was called by

one Harijan boy for the panchnama. The panchnama was drawn by the police and on their insistence he had subscribed his thumb impression. At that time, he and other panch were sitting on a corner of the field. After the police completed the panchnama, he was asked to subscribe his thumb impression and he had subscribed his thumb impression on the panchnama.

PW-2 Ganeshbhai Panchabhai, Exhibit-13, is a witness, who was concerned PSO of Tharad Police Station and had received papers of Criminal Enquiry No. 14 of 1996 from the Special Judge of Banaskantha forwarded to the Police Station under Section 156(3) of the Code of Criminal Procedure. The witness stated that he recorded and registered the said complaint in Tharad Police Station as`M' Case No. 46 of 1996 and investigation was entrusted to ASI Ambuji Mastuji. He recorded the First Information Report, which he produced at Exhibit-14. To ascertain whether the police station concerned received original complaint or copy of the same, cross-examination has been conducted by the defence.

PW-3 Kantaben, widow of complainant Amra Okha, is examined at Exhibit-16. She stated that before the incident, they had prepared crop of bajara in their field and when crop was prepared and

ripe, which was cropped and was stacked in the field. At the time of the incident she was sleeping in the house situated in the field. At that time, she noticed fire in the field and they started shouting. She was not keeping good health at that time. She did not know who burnt the crop of bajara. She stated that she did not know the accused sitting in the court. She further stated that the complaint was given by her husband and police had recorded her statement. She further stated that crop of bajara was burnt by one Rabari, but she did not give any name. She stated that they belonged to scheduled caste. It did not happen that the accused had given abuses to them. She is contradicted with her police statement in cross-examination wherein she had stated that on account of her ill-health, she was not in a position to stand up from bed. She admitted that before ten days of the incident, the accused had filed a criminal complaint against her husband and elder brother of her husband. She admitted that both of them were arrested by the police.

PW - 4 Jagabhai Keshrabhai is examined at Exhibit-17. He is cousin brother of the complainant. According to him, before the incident, he was working in the agricultural operation of the accused and it was determined that 25 per cent of the profit was to be assigned to this witness. According to him, Rs. 8,000 to 10,000/- were due from

the accused on account of his 25% of the profit. According to the witness, he demanded the said amount, but accused had threatened him. At the time of incident, he was at this residence situated at a half kilometer away from the field of the complainant. The incident occurred between 2 and 3'O clock at night, and on noticing fire, he ran towards the field of the complainant. He noticed that the crop of bajara was put on fire. Amrabhai i.e. complainant and one Ishwarbhai were present there. He inquired from Amrabhai about the fire and Amrabhai replied that accused put the fire in the crop of bajara and had gone away. In his cross - examination, he denied the suggestion that while he was working as an agricultural labourer with the accused, the accused had given him clothes, other things and cash amount. He denied that the accused had settled the accounts with him, but he admitted that, in said account, on the contrary, Rs. 10,000/- were due to the accused from him. He admitted that the earlier incident on 10th of September, 1996, wherein he, complainant and one person named as Kantiji, had been to the field of the accused and had picked up a quarrel, in which he had given a stick blow to the accused. He admitted that, in this incident, the accused had filed a complaint before the police and all the three were arrested by the police. He was confronted with his police statement wherein he did not state that Rs. 8,000/- to 10,000/- were due to him from the accused.

PW-5 Rameshbhai Pababhai is examined at Exhibit-22. According to him, the day of the incident i.e. 28th of September, 1996, he was at his residence and he noticed the fire. According to the witness, he ran to the field of the complainant where he found his brother Pirabhai and other persons named as Jesungbhai, Hardasbhai, etc. At that time, accused was there and was giving abuses and was insulting the caste of the complainant. According to the witness, complainant conveyed to him that accused had put fire on the heaps of the crop. In his cross – examination, he admitted that, he was nephew of the complainant and admitted the incident earlier occurred in which the complainant, etc. were accused. An attempt was made in cross-examination by the defence that the field of this witness was situated at a distance from the field of the complainant.

PW-6 Jesungji Karsanji is examined at Exhibit-23. According to this witness, his field was situated just adjoining to the field of the complainant and his residential house was situated in his field. At the time of the incident, in the field of Amrabhai, ready crop of bajara was stacked in the field. He heard commotion and, therefore, he went to the field of the complainant and noticed that the crop was burning. He noticed one person running from there and he identified that person to be accused. He further stated that the complainant conveyed to them

that accused was also insulting their caste and was threatening. In his cross - examination, he was asked about what was the crop in his field, which he replied that, he had sow the corp of `rayda'. He admitted the fact that earlier the accused had filed a complaint against the complainant, etc.

PW-7 Ambuji Masutji is examined at Exhibit – 26, who is the Investigating Officer, and according to him, he received the investigation of `M' Case No. 46 of 1997, draw the panchnama of scene of offence and recorded the statements of concerned witnesses.

4 The learned APP Mr. I.M. Pandya submitted vehemently that though the complainant has expired after filing of the complaint, at least, incident is proved by the depositions of the other witnesses and particularly by PW-5, PW-6 and PW-3 examined by the prosecution. Learned APP submitted that the Trial Court erroneously came to the conclusion that the case was not proved beyond doubt. At least, according to learned APP, PW-6 Jesungji Karsanji is an eye witness and he has noticed the accused at the scene of offence. Since the conclusion arrived at by the Trial Judge of acquittal is erroneous, the Appeal requires consideration.

5 The learned Trial Judge has given reasons for acquittal in para-16 of his judgment wherein he concluded that the Special Court had no jurisdiction to take the cognizance directly of the private complaint filed and, therefore, the trial had vitiated as it was only the Judicial Magistrate, First Class, was competent to take cognizance. Learned Trial Judge also came to the conclusion that there was no complaint on record signed by the complainant as the private complaint filed by the complainant before the Special Court had not been produced on record of the trial and a copy of the complaint was sent to the police for investigation. It was also concluded by the Trial Court that according to Rule-7 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Rules, investigation was required to be carried out by Deputy Superintendent of Police only and no other officer below that rank, while investigation in this case was carried out by Assistant Sub-Inspector. On facts, the learned Trial Judge came to the conclusion that the prosecution failed to prove the genesis of the incident. According to the prosecution case, the accused owed some amount to witness Jagabhai Keshrabhai, cousin brother of the complainant, and that was the cause of the dispute because PW-4 Jagabhai Keshrabhai was demanding amount from the accused and accused was threatening to Jagabhai and Amrabhai both and, therefore, the accused put fire in the crop of the complainant. The

learned Trial Judge came to the conclusion that witness Jagabhai Keshrabhai, in his deposition at Exhibit -17, admitted that on the contrary the accused owed the amount to him and he could not pay the said amount to the accused and the accused was demanding that amount from him frequently. It is, therefore, concluded by the Trial Judge that the genesis of the incident creates doubt as many contradictions appeared in the prosecution case in this respect. The learned Trial Judge also came to the conclusion that there was no direct evidence on factual aspect and whatever evidence was recorded was hearsay evidence and not the direct evidence and, therefore, since no complaint of the complainant is produced on record and there was no direct evidence of the incident, accused was entitled to acquittal.

6 However, we have gone through the evidence recorded during the trial and the reasons assigned by the Trial Court. We have called for the Record and Proceedings from the Trial Court and have carefully scanned through each document produced by the prosecution and have appreciated the evidence of each witness at this stage. We have undertaken independent and dispassionate appreciation of evidence and have come to our own finding. This being an acquittal appeal, it is established principle of law that unless it is found that the Trial Court mis-appreciated the evidence, causing mis-carriage of

justice, no interference is allowed lightly, though this Court has power to appreciate the evidence independently. Needless it is to say that, if the High Court comes to different conclusion from the Trial Court, it becomes the duty of this Court to dislodge the reasons assigned by the Trial Court for the acquittal and to show that they were so perverse that interference was absolutely required.

7 While scanning the evidence recorded during the trial, we found that three witnesses, PW-3 Kantaben, Exhibit–16; PW-4 Jagabhai Keshrabhai, Exhibit-17 and PW-5 Rameshbhai Pababhai, Exhibit–22, are the witnesses of the incident.

8 However, the fact remains that complainant Amrabhai died after filing of the complaint and his death certificate is produced at Exhibit-18. The fact also establishes that no complaint signed by the complainant could be produced on record and, therefore, a copy which is produced on record, is not relevant even under Section 32 or 33 of the Indian Evidence Act. Therefore, the statement of the complainant, who is dead, cannot be proved.

9 Necessary to note that PW-3 Kantaben is of no avail to the prosecution that because she has not witnessed the incident as per

her say in examination-in-chief. Likewise, PW-4 Jagabhai Keshrabhai also is not an eye witness of the incident and he has not seen the accused putting fire to the crop, instead he stated what was conveyed to him by the complainant. In absence of the statement of complainant, who is dead, this is mere hearsay evidence, and nothing could be concluded from the evidence of PW-4. Likewise, Rameshbhai Pababhai - PW-5 states to the extent that when he reached at the field, accused was running from there and was giving abuses and was insulting their caste and thereafter he was conveyed by the complainant that the accused had put fire in the crop. Necessary it is to note that this witness is the nephew of the complainant. PW-4 Jagabhai Keshrabhai is also cousin brother of the complainant. Both these witnesses are related witnesses and their evidence must be scrutinized carefully. With this background, a fact must must be taken into consideration that, before 10 to 16 days of this incident, an incident had occurred, in which the complainant Jagabhai Keshrabhai and one third person had assaulted the accused, for which a complaint was filed by the accused, and all the three persons were arrested. Meaning thereby that, there was enmity between the parties. Now in these circumstances, when PW-3 and PW-4 are unable to depose anything in respect of facts and PW-5 Rameshbhai Pababhai being relative of the complainant and states only to the extent of noticing the

accused running from the field with pelting abuses, we safely can conclude that no reliance can be placed on whatever is said by PW-5 Rameshbhai. There is no other evidence on record to connect the accused with the crime and no eye witness is examined by way of a direct evidence. Even other circumstances are evaluated with the evidence recorded of the witness like cause of dispute, earlier incident between the parties in which assault was made upon the accused and the distance between the villages of the complainant and the accused, it appears that prosecution failed to prove case beyond doubt against the accused. As aforesaid, only evidence of PW-5 Rameshbhai connects accused to the extent of running away from the field, and that evidence, for the reasons stated above, is not reliable.

10 Therefore, we also come to the same conclusion that the prosecution failed to prove the case beyond reasonable doubt against accused. We do not subscribe our view to the conclusion of the Trial Court in respect of investigation being void and that the Special Court had no powers to take cognizance of the complaint and we do not express any opinion in this regard. We have evaluated the facts of the incident and from the evidence recorded, we agree with the Trial Judge that the prosecution failed to prove the incident alleged to have taken place, in which it is alleged that the accused put fire in the

crop of the complainant. We conclude that the order of acquittal is not required to be interfered because the prosecution failed to prove the incident itself in which the accused allegedly involved himself in putting fire to the crop of the complainant.

11 For the above said reasons, Leave to Appeal is refused. Appeal stands dismissed.

(J. R. VORA, J.)

(BANKIM.N.MEHTA, J.)

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